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No. 82-1579

In the Supreme Court of the United States

OCTOBER TERM, 1983

HAYFIELD NORTHERN RAILROAD COMPANY, INC., AND MINNESOTA, APPELLANTS

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10905, preempts state law authorizing the condemnation of an abandoned railroad line for the purpose of providing rail service.

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49 U.S.C. (Supp. V) 10904(c) 19
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C. Miller, *ICC Law and Procedure* (1939) 2

Railroad Deregulation Act of 1979: Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (1979) 19, 21

Railroad Deregulation Act of 1979: Hearings on S.796 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 1st Sess. (1979) 19, 21, 22

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Railroad Transportation Policy Act of 1979: Hearings on S. 1946 Before the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 1st Sess. (1979) 19, 21
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S. 1946, 96th Cong., 1st Sess. (1979) 21
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INTEREST OF THE UNITED STATES

On May 16, 1983, the Court invited the Solicitor General to express the views of the United States in this case. In response we filed a brief urging the Court to note probable jurisdiction; we hereby submit the views of the United States at the merits stage.

As noted in our previous submission, the United States' view is that the Interstate Commerce Act does not preempt state law authorizing abandoned railroad lines to be taken by eminent domain; nor would the exercise of state power in this case interfere with or materially affect the programmatic interests of the Interstate Commerce Commission or any other department or agency of the United States. The United States' interest in this case is, therefore, that federal law not be misconstrued and overenforced so as to result in an unwarranted pre-

emption of state authority. The United States has a substantial interest in the maintenance of a proper relationship between the national and state governments and the preservation of state authority where no federal interest requires the displacement of state law.

STATEMENT

The Interstate Commerce Act requires that the abandonment of railroad lines be approved by the Interstate Commerce Commission (ICC). See 49 U.S.C. (Supp. V) 10903.[1] The Act also provides an alternative to abandonment: if, during the abandonment process, a financially responsible person (including a government authority) makes an offer of financial assistance to purchase the rail line or subsidize its operations, the rail carrier must—in lieu of abandonment—sell the line or continue to provide rail service under the subsidy. See 49 U.S.C. 10905. The question presented in this case is whether this financial assistance provision—Section 10905—preempts a Minnesota law authorizing the condemnation, for subsequent railroad use, of a rail line *after* it has been duly abandoned with the approval of the ICC.

Resolution of this issue depends upon a proper understanding of the Interstate Commerce Act; we therefore begin with a brief discussion of the history and structure of the Act.

A. The Statutory Background

1. The Interstate Commerce Act was passed in 1887 (see Act of Feb. 4, 1887, ch. 104, 24 Stat. 379); it was the first great federal regulatory statute adopted under the Commerce Clause. See G. Gunther, *Constitutional Law* 134 (9th ed. 1975).[2] The 1887 Act did not include provisions subjecting railroad abandonments to the approval of the ICC.

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[1] We will hereinafter omit "Supp. V" in references to the current version of the Act.

[2] For the background of the 1887 Act, see, *e.g.*, I. Sharfman, *The Interstate Commerce Commission* (Pt. 1), 11 *et seq.* (1931); C. Miller, *ICC Law and Procedure* 43 *et seq.* (1939).

The Commission's authority over abandonments was established in the Transportation Act of 1920, ch. 91, 41 Stat. 456, 49 U.S.C. (1925 ed.) 1(18)-(22). See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319-320 (1981). The 1920 Act "introduced into the federal legislation a new railroad policy." *New England Divisions Case*, 261 U.S. 184, 189 (1923). Previously, "the effort of Congress had been directed mainly to the prevention of abuses * * *. The 1920 Act sought to ensure, also, adequate transportation service" (*ibid.*). The 1920 Act was designed "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country" (*Dayton-G.C. Ry.* v. *United States*, 263 U.S. 456, 478 (1924)) and "to provide the public with an efficient and nationally integrated railroad system" (*ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373, 376 (1942)). See also, *e.g.*, *Wisconsin R.R. Comm'n* v. *Chicago, B. & Q. R.R.*, 257 U.S. 563, 585 (1922); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 81 (1944).

Among the principal concerns giving rise to the 1920 Act was the conflict between federal and state regulation of railroads. Prior to the Act,

> regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for.

Transit Comm'n v. *United States*, 289 U.S. 121, 127 (1933). See also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 320. ICC abandonment authority represents an integral part of this statutory scheme and seeks to ensure that "interstate commerce [is protected] from undue burdens" that might be imposed by state requirements concerning the continuation or elimination of service. *Colorado* v. *United States*, 271

U.S. 153, 162 (1926). See also *id.* at 163, 166, 168; *New England Divisions Case*, 261 U.S. at 190 & n.8; *Railroad Comm'n* v. *Eastern Tex. R.R.*, 264 U.S. 79, 83-84 (1924).

The abandonment provisions of the 1920 Act remained substantially unchanged until 1976. In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, § 802, 90 Stat. 127, 146, originally codified at 49 U.S.C. (1976 ed.) 1a, Congress revised the abandonment provisions to impose a specified schedule to govern the abandonment process. In addition, the 4-R Act allowed abandonment to be delayed for six months if a financially responsible person offered to subsidize or purchase a rail line authorized for abandonment. However, the 4-R Act did not require the railroad in such a case to sell the line or provide service under a subsidy. See 49 U.S.C. (1976 ed.) 1a(6).[3]

2. The Interstate Commerce Act was further amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1942. In its current form, the Act provides that a rail carrier subject to ICC jurisdiction may abandon its lines or discontinue its operations "only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. 10903(a). The Act requires that the carrier file with the ICC an "application for a certificate of abandonment or discontinuance * * * and a notice of intent to abandon or discontinue * * *." 49 U.S.C. 10904. The Act also sets strict time limits for the ICC to render a decision on abandonment applications. *Ibid.*

The provision at issue in this case—Section 10905—provides that the Commission shall publish in the Federal Register its findings "that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line" and that "[w]ithin

[3] The 1976 provisions were subsequently recodified, without substantive change, as 49 U.S.C. (Supp. II) 10903 *et seq.* See Pub. L. No. 95-473, 92 Stat. 1405; *Chicago & N.W. Transp. Co.* v. *United States*, 582 F.2d 1043, 1048 (7th Cir.), cert. denied, 439 U.S. 1039 (1978).

10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line." 49 U.S.C. 10905(c). If the ICC finds within 15 days that the offeror is "a financially responsible person (including a government authority)" and that the offer of assistance meets prescribed standards, it "shall postpone the issuance of a certificate authorizing abandonment or discontinuance * * *." 49 U.S.C. 10905(d).

In the event the offeror and the carrier "fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation." 49 U.S.C. 10905(e). Upon such request, the ICC is "to establish the conditions and amount of compensation * * * within 60 days," and this "decision * * * shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision." 49 U.S.C. 10905(f)(1)(A) and (2). If the offer is withdrawn, "the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance * * *" (*ibid.*).

Under the provisions of Section 10905, the maximum time that may elapse from the ICC's publication of proposed abandonment to the conclusion of the process for subsidy or purchase is 110 days.

B. Proceedings In This Case

1. The relevant facts in this case are undisputed and are set forth in the opinion of the court of appeals (J.S. App. A2-A3). In July 1981, the Commission issued an initial decision pursuant to 49 U.S.C. 10903 that the public convenience and necessity require or permit the abandonment of a 44-mile branch line owned and operated by appellee Chicago and North Western Transportation Company (CNW) in Iowa and Minnesota. Pursuant to Section 10905, a group of shippers on the line submitted an offer of financial assistance to subsidize the operation of a 19.2-mile segment of the line in Minnesota (the Hayfield segment). The group also filed an administrative

appeal from the initial decision insofar as it permitted abandonment of the Hayfield segment.

The Commission found that the shippers' group was a "financially responsible person" within the meaning of Section 10905(d) and, as required by that Section, delayed the issuance of the certificate of abandonment that would have allowed CNW to cease operating the line. Because of the inability of the shippers' group and CNW to agree on a subsidy, the shippers' group asked the Commission, pursuant to Section 10905(e), to establish the conditions and level of subsidy. The Commission determined the subsidy level and, as part of that calculation, also determined the net liquidation value of the Hayfield segment to be $1,791,354. The shippers' group thereafter withdrew its subsidy offer as permitted under Section 10905(f)(2). J.S. App. A2.

In October 1981, the Commission affirmed its initial decision allowing the abandonment of the entire line, including the Hayfield segment.[4] The Commission issued an abandonment certificate in November 1981. All of the foregoing actions occurred in timely compliance with the requirements of Section 10905. J.S. App. A2.

2. On December 17, 1981, CNW ceased operating the line. Thereafter, CNW made arrangements to salvage and utilize the track from this line in a project in Iowa (J.S. App. A3).

On March 31, 1982, members of the shippers' group formed appellant Hayfield Northern Railroad Company, Inc. (Hayfield Northern), a Minnesota public service corporation that has power under Minnesota law to condemn rail lines for railroad purposes. Hayfield Northern immediately filed suit in state court, alleging that it desired to condemn the right of way, track, and appurte-

[4] The shippers' group petitioned for judicial review in *Brownsdale Cooperative Ass'n* v. *United States*, No. 81-2333 (8th Cir. filed Dec. 3, 1981), and sought a stay pending review of the Commission's final decision. After the court denied the request for a stay, the shippers moved to dismiss their petition. The court granted this voluntary dismissal on January 14, 1982.

nances of the Hayfield segment. It also sought a temporary restraining order to prevent CNW from dismantling the line. The state court granted the restraining order. J.S. App. A3.

CNW removed the suit to the United States District Court for the District of Minnesota and moved to dismiss on the ground that Section 10905 preempts state law authorizing condemnation of an abandoned rail line for railroad purposes. The State of Minnesota intervened on the side of Hayfield Northern in order to defend the applicability and validity of its statute. J.S. App. A3.

The district court granted summary judgment in favor of CNW because "federal law has preempted the state law as it applies to procedures seeking continued rail service in connection with an abandonment" (J.S. App. A15). The court dismissed the complaint with prejudice and dissolved the restraining order (*id.* at A16).

3. The United States Court of Appeals for the Eighth Circuit granted a stay to Hayfield Northern upon the posting of a bond. After argument on the merits, the court of appeals dissolved the stay, affirmed the judgment of the district court, and remanded to that court "for a determination of the amount of damages due CNW on account of delay" (J.S. App. A12).

The court of appeals held that Section 10905 preempts the Minnesota statute because "the state law authorizing Hayfield Northern to condemn CNW's abandoned railroad line for continuing rail purposes 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (J.S. App. 5, quoting *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982)).[5] First, the court concluded that

[5] The court of appeals confined its holding to state condemnation "for continued rail service" and did not decide "whether condemnation for non-rail public purposes would also be pre-empted by federal law" (J.S. App. A9). Compare *Chicago & N. W. Transp. Co.—Abandonment—Between Clintonville and Eland, Wisc.*, 363 I.C.C. 975 (1981) (ICC authority under Section 10905 to set the conditions and amount of financial assistance does not extend to offers for non-rail use).

Section 10905 "makes provision for continued rail service an integral part of the federal abandonment process" (J.S. App. A6). The court also concluded that "[t]he elaborate procedural detail of this scheme indicates that * * * the Commission [has] exclusive and plenary authority to provide for continuation of rail service in connection with abandonments" (*id.* at A7). In particular, the court found that state condemnation actions might involve " 'protracted legal proceedings' " that would frustrate "the benefits of the 110 day time schedule" under Section 10905 (J.S. App. A7), and "would circumvent the Commission's determination of value" and deviate from the "expedited method by which [the] sale price may be determined [under Section 10905]" (J.S. App. A8). Finally, the court rejected appellants' argument that the Commission and the federal courts had recognized that the Interstate Commerce Act does not preempt state authority to condemn rail lines (*id.* at A8-A11).

Following the denial of rehearing by the court of appeals (J.S. App. A16-A17), this Court denied appellants' motion to stay the issuance of the court of appeals' mandate (*id.* at A26-A27). On October 3, 1983, the Court noted probable jurisdiction in this case.

SUMMARY OF ARGUMENT

The Interstate Commerce Act does not preempt traditional state power to condemn property that was formerly used as a rail line and that has been abandoned pursuant to a certificate of abandonment issued by the ICC. The Commission's abandonment authority ends at the point that the certificate of abandonment takes effect. Likewise, the Commission's authority with respect to offers of financial assistance under Section 10905 (49 U.S.C. 10905) is limited to pre-abandonment offers and is designed to provide continued and uninterrupted service by means of purchase or subsidy prior to abandonment. The Commission's authority over abandonments, including its authority to facilitate continuing rail service under pre-abandonment offers of financial assistance,

does not establish federal control over post-abandonment transfers of property previously used to provide rail service and therefore does not preempt state authority to condemn an abandoned line, even if the state's purpose is eventually to commence new service under a fresh ICC certificate of public convenience and necessity.

The provisions of Section 10905 are not designed to create an exclusive method for assuring future rail service over a rail line that the ICC has authorized to be abandoned. Nothing in the language of the statute or its legislative history calls for such exclusivity or suggests a congressional intent to preempt state power to condemn abandoned lines. Section 10905 simply provides a mechanism to assist those who seek uninterrupted service; the possibility of pre-abandonment acquisition under federal law does not operate to the exclusion of all possibilities of post-abandonment acquisition under state law. Nor do the time limits and valuation procedures in Section 10905 suggest that the statute was meant to be exclusive. These provisions merely regulate the acquisition of lines before abandonment occurs and were designed to eliminate delay in the Commission's abandonment process in order to reduce the burden on carriers who must maintain service until the ICC has approved the abandonment. This statutory scheme is not impaired by a state's condemnation of a line for which the ICC has already issued an abandonment certificate relieving the carrier of its obligation to continue rail service.

The Commission itself has determined that its abandonment authority, including its authority under Section 10905, does not extend beyond the point at which the certificate of abandonment becomes effective, and thus it has recognized that a state's authority to effect a post-abandonment condemnation is not preempted. The Commission's reasonable interpretation of the Interstate Commerce Act is entitled to judicial deference and supports the conclusion that the Act does not preempt state power to condemn a rail line that has been abandoned with ICC approval.

ARGUMENT

THE INTERSTATE COMMERCE ACT DOES NOT PREEMPT A STATE'S AUTHORITY TO CONDEMN A RAIL LINE THAT HAS BEEN ABANDONED WITH THE APPROVAL OF THE ICC

The court of appeals erred in holding that the Interstate Commerce Act preempts state authority to condemn a railroad line after that line has been abandoned with the approval of the ICC. The court's decision fails to recognize that the Commission's authority over abandonments, including its authority pursuant to Section 10905, does not extend beyond the point at which the certificate of abandonment becomes effective. Thus, a state's post-abandonment condemnation of a rail line—whether for purposes of reinstituting rail service or otherwise [6]—does not intrude upon the Commission's exclusive abandonment authority.

The court of appeals' central mistake was its conclusion that the scheme created by Section 10905, authorizing a pre-abandonment "take-over" under ICC supervision in order to assure uninterrupted rail service in certain cases, was intended to provide the sole and exclusive method for providing *future* rail service over such lines, and thus prohibits the initiation of steps under state law, after abandonment, to restore rail service to those lines. Properly viewed, Section 10905 simply provides a method for assuring that, in the face of what would otherwise be abandonment, rail service continue. (It is, of course, a special and advantageous method because it avoids abandonment and assures uninterrupted continuity of service without the need for new certification by the ICC.) But this method was never designed to displace other traditional ways for states to initiate steps designed to bring about the creation of new rail service. One such method,

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[6] Of course, a new operator must obtain a certificate from the Commission before recommencing rail service. See 49 U.S.C. 10901; 49 C.F.R. 1150.1 *et seq.*; *Common Carrier Status of States*, 363 I.C.C. 132, 138 (1980), aff'd *sub nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982); J.S. App. A49.

wholly conventional, is to bring eminent domain proceedings; eventually this will lead to a request to the ICC for a certificate of public convenience and necessity for new rail service. No federal interest is harmed or affected by the invocation of state condemnation law against property formerly used for rail service but now duly abandoned pursuant to ICC authorization, even though the purpose of the condemnation is, ultimately, to restore rail service on that line. The federal interest in that case is precisely the same as it would be with respect to property owned by CNW (or others) that had never previously been used for rail service: to assure that any new rail service is properly certificated by the Commission.

Consequently, since no federal statutory or programmatic interest is adversely affected by the exercise of the state's condemnation power in this case, and since no such interest is furthered by the preemption of that power (see J.S. App. A59), we agree with appellant that the Interstate Commerce Act does not preempt state authority to condemn an abandoned railroad line, even if the purpose of the condemnation is to restore rail service on that line.[7]

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[7] The court of appeals did not suggest, and appellants' jurisdictional statement does not argue, that Congress in the exercise of its power under the Commerce Clause could not preempt the condemnation of abandoned railroad lines. Cf. *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 17 n.26; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941); *Transit Commission* v. *United States*, 284 U.S. 360, 368 (1932); *Colorado* v. *United States*, 271 U.S. 153, 165-166 (1926). As a matter of constitutional principle, such a statute would be no different from the established federal preemption of state condemnation of rail lines prior to abandonment. See, *e.g.*, *In re New York, N.H. & H.R.R.*, 447 F.2d 428, 429-430 (2d Cir. 1971); *Massachusetts* v. *Bartlett*, 266 F. Supp. 390, 392-393 (D. Mass.), aff'd in relevant part, 384 F.2d 819, 820 (1st Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967); *City of Des Moines* v. *Chicago & N.W. Ry.*, 264 F.2d 454 (8th Cir. 1959); *Kansas City Area Transp. Authority* v. *Ashley*, 555 S.W.2d 9 (Mo. S. Ct.), cert. denied, 434 U.S. 1066 (1977); cf. *Board of Hudson River Regulating Dist.* v. *Fonda, J. & G.R. Co.*, 249 N.Y. 445, 164 N.E. 541 (1928); but

The Court has recently noted that "[t]he goal of any preemption inquiry is 'to determine the congressional plan.'" *Rice* v. *Rehner*, No. 82-401 (July 1, 1983), slip op. 4-5, quoting *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1956). In making that inquiry, "'we start with the assumption that the historic police powers of the States were not to be superseded by Federal Acts unless that was the clear and manifest purpose of Congress.'" *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts" (430 U.S. at 525; citation omitted).

Accordingly, it is well settled that "'an unexpressed purpose to nullify * * * [state power] is not lightly to be attributed to Congress.'" *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980), quoting *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). "Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). And, where possible, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).[8]

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cf. *Chicago, R.I. & G. Ry.* v. *Tarrant County Water Control & Improvements Dist.*, 76 S.W.2d 147 (Tex. Ct. Civ. App. 1934), cert. denied, 295 U.S. 762 (1935). See also J.S. App. A45 n.2. Thus, the only question in this case is whether, as a matter of statutory construction, the Interstate Commerce Act preempts a state's post-abandonment condemnation.

[8] These principles are especially apt in a case involving a state's condemnation authority, which is "part of its sovereign power"

It is in light of these principles that we now show that the Commission's abandonment authority should not be taken to preempt the states' authority to condemn abandoned rail lines.

A. ICC Authority Over Abandonments Does Not Preempt A State's Authority To Condemn A Rail Line After It Has Been Abandoned

Nothing in the abandonment authority of the ICC justifies the court of appeals' conclusion that the acquisition of an already-abandoned rail line for the purpose of restoring service is "an integral part of the federal abandonment process" (J.S. App. A6) or that the Commission has "exclusive and plenary authority" over such matters "in connection with abandonments" (*id.* at A7). On the contrary, the Commission's abandonment authority simply ceases when the abandonment has taken effect.

It is, of course, common ground that a railroad line cannot be abandoned without the approval of the ICC. See 49 U.S.C. 10903(a); *Thompson* v. *Texas M. Ry.*, 328 U.S. 134, 144-145 (1946); *Smith* v. *Hoboken R.R.*, 328 U.S. 123, 130 (1946); see also *California* v. *Southland Royalty Co.*, 436 U.S. 519, 529 n.6 (1978). Thus, a carrier's "operation must continue until a certificate permitting abandonment is issued by the Interstate Commerce Commission." *Warren* v. *Palmer*, 310 U.S. 132, 138 (1940). It also is settled that the Commission has "exclusive" and "plenary" authority over abandonments. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 320, 321.

ICC abandonment authority terminates, however, when the abandonment has taken effect. As discussed above (see page 3, *supra*), the purpose of the Interstate Commerce Act, including the abandonment provisions, is "to maintain an adequate railway service for the people

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(*United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 277 (1943)) and "an attribute of sovereignty * * * [that] inheres in every independent State * * * [and is] necessary for the proper performance of governmental functions" (*Georgia* v. *City of Chattanooga*, 264 U.S. 472, 480 (1924)).

of the United States" (*Wisconsin R.R. Comm'n* v. *Chicago, B. & Q. R.R.*, 257 U.S. 563, 585 (1922)) and to ensure that "interstate service may be adequately rendered" (*Colorado* v. *United States*, 271 U.S. 153, 166 (1926)). In order for the Commission to approve an abandonment—which involves a cessation " 'permanently or indefinitely [of] all transportation service on the relevant line' " (*Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 314 n.2; citation omitted)—it must find that the "present or future public convenience and necessity require or permit" that the line be abandoned. 49 U.S.C. 10903(a)(2). Thus, in issuing an abandonment certificate, the Commission has "adjudged that public necessity and convenience d[o] not demand the continuance of [those] interstate services." *Colorado* v. *United States*, 271 U.S. at 170. And once it has been determined that the line may be withdrawn from the interstate rail system, the Commission's regulatory authority is at an end. See J.S. App. A59. Accordingly, a state's condemnation of an abandoned line does not involve the "conflicting * * * [m]ultiple control" (*Transit Comm'n* v. *United States*, 289 U.S. at 127) by federal and state authorities that the Interstate Commerce Act was designed to prevent, and is not preempted by the Commission's power over abandonments.

Section 10905 accords with this statutory abandonment scheme. Section 10905 is intended, as its title indicates, "to avoid abandonment[s]." By its terms, Section 10905 involves offers of financial assistance that are submitted prior to abandonment (see 49 U.S.C. 10905(c)-(e)) in order to "provide continued rail service" (49 U.S.C. 10905(e) and (f)). It "creates a method for transferring the rail properties prior to their downgrading [through abandonment]." H.R. Rep. 96-1035, 96th Cong., 2d Sess. 43 (1980). As the Commission has recognized, Section 10905

> envisions * * * uninterrupted service * * *. Offers of financial assistance are meant to avoid abandonment and discontinuance.
>
> * * * * *

> [U]nder 49 U.S.C. 10905 we can require a sale, which will *provide continued rail service.*

Abandonment of Railroad Lines and Discontinuance of Service, 365 I.C.C. 249, 260, 261 (1981) (emphasis in original).

Once a rail line has been abandoned, Section 10905 becomes inapplicable. At that point, the issue is not—as the court of appeals believed—the "continuation of rail service" (J.S. App. A7) but rather the commencement of new service requiring a fresh certificate of public convenience and necessity from the Commission (see page 10 note 6, *supra*). Accordingly, the Commission's authority over abandonments, including its authority to facilitate continuing rail service pursuant to pre-abandonment offers of purchase or subsidy, does not call for federal control over post-abandonment transfers of property formerly used for railroad purposes.

The court of appeals' decision creates—apparently in perpetuity—a no-man's land in which abandoned rail lines may not be regulated by the ICC or condemned by the state.[9] To create a special class of property thus exempt from normal processes of government regulation is unwise and unwarranted. Rather, federal and state authority in this area should be reconciled by holding that the Interstate Commerce Act grants exclusive authority to the ICC over pre-abandonment transfers to preserve continued and uninterrupted railroad operations, but does not prevent the states from condemning rail lines on which service has been abandoned pursuant to ICC approval.

The court of appeals' decision in this case is a far cry from what appellee characterizes as a "logical extension" (Mot. to Aff. 19) of *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, *supra*. In *Kalo Brick*, the Court held that the ICC's exclusive authority to regulate abandon-

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[9] The court of appeals' opinion furnishes no guidance on such questions as the length of time following abandonment that state condemnation is preempted or whether and in what situations a change of circumstances would enable the state to exercise its condemnation power.

ment preempts a state court judgment for damages based on the discontinuance of rail service. The Court in *Kalo Brick* found that the state award of damages "impose[d] sanctions upon a regulated carrier for doing that which only the Commission * * * has the power to declare unlawful or unreasonable" (450 U.S. at 324) and rested on "precisely the sorts of concerns that Congress intended the Commission to address in weighing abandonment requests from the carriers subject to its regulation" (*id.* at 326-327; footnote omitted). For these reasons, the Court rejected the attempt

> in essence * * * to use state law to compel [the carrier] to furnish cars in spite of the congressional decision to leave regulation of car service to the Commission. * * * It would vitiate the overarching congressional intent of creating "an efficient and nationally integrated railroad system" * * * to permit the State * * * to do exactly what the Commission is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.

450 U.S. at 325-326 (citation omitted). In contrast to *Kalo Brick*, nothing in the Commission's authority over abandonments—including its authority over pre-abandonment offers of financial assistance for continued rail service—is inconsistent with a state's post-abandonment condemnation of a rail line.

B. The Provisions Of Section 10905 Do Not Provide The Exclusive Means For Acquiring A Rail Line And Do Not Displace A State's Post-Abandonment Condemnation Authority

The court of appeals was led to its preemption holding by its conclusion (J.S. App. A7-A8) that the provisions for purchase or subsidy in Section 10905 were designed to provide the exclusive means for acquiring a rail line that the ICC has authorized to be abandoned. The court

inferred such exclusivity from the time limits and valuation procedures specified in Section 10905.

1. At the outset, we note that Section 10905 and its legislative history are entirely silent on the question of preemption of a state's post-abandonment condemnation of a rail line. The Court has noted in a similar context that "[i]f this old and familiar power of the states was withdrawn * * *, we ought to find language fitting for so drastic a change." *Palmer* v. *Massachusetts*, 308 U.S. 79, 85 (1939). Thus, the direct answer to the court of appeals' holding of exclusivity is "that the statute contains no such provision nor any language suggesting it." *Central N. E. Ry.* v. *Boston & A. Ry.*, 279 U.S. 415, 419 (1929).

In fact, there is particular reason here to expect that Congress would have spoken affirmatively if it had intended to preempt the states' post-abandonment condemnation authority. Section 10905 specifically contemplates that an offer of financial assistance can be made by "a government authority" (49 U.S.C. 10905(d)(1)); Congress's attention was thus drawn to the question of the activities of states in connection with abandonments. In these circumstances, Congress's silence on a matter as fundamental as condemnation "'strongly suggests that [it] did not intend'" to displace state authority (*United States* v. *Bass*, 404 U.S. 336, 350 (1971), quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)) or "significantly change[] the federal-state balance" (404 U.S. at 349; footnote omitted).

2. Not only does the statute contain no direct expression of exclusivity, it likewise suggests no basis for the court of appeals' conclusion that it was intended by implication to furnish the exclusive method for acquiring a rail line that the ICC has approved for abandonment. Section 10905 simply provides a mechanism to assist those who seek to continue existing service; it allows them to take steps to acquire the line prior to abandonment and thus assure uninterrupted service. But there is no indication that Congress intended the possibility of pre-abandonment acquisition (under federal law) to displace

all possibilities of post-abandonment acquisition (under state law).

Indeed, Section 10905 explicitly allows an offeror to "withdraw his offer within 10 days of the Commission's decision [on the conditions and amount of compensation]" (49 U.S.C. 10905(f)(2)). By this provision, Congress presumably intended that the situation would return to the status quo ante and that the offeror would be able to invoke whatever preexisting rights it might have—including, in the case of a state, the right of condemnation.

Moreover, the time limits and valuation procedures contained in Section 10905, upon which the court of appeals relied in finding exclusivity, were merely designed to regulate the acquisition of lines prior to abandonment. As we now proceed to show, the purposes of these provisions would not be impaired by state condemnation of a rail line that has been abandoned, and therefore they do not imply that pre-abandonment offers of financial assistance are to operate to the exclusion of post-abandonment acquisitions.

a. *Time Limits.* In enacting the abandonment provisions of the Staggers Act of 1980 (see pages 4-5, *supra*)—which include the provision for offers of financial assistance (see Pub. L. No. 96-448, § 402, 94 Stat. 1942)—Congress sought to reduce the delays involved in the abandonment process. Because rail service cannot be terminated until the ICC issues a certificate of abandonment, delays in authorizing abandonment impose a burden on the carrier seeking to cease operations on the line.

In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, § 802, 90 Stat. 127, 146, 49 U.S.C. (1976 ed.) 1a, Congress first established a specified schedule for the issuance of abandonment certificates. See page 4, *supra*. These provisions

> put[] strict time limits on * * * abandonments * * *. In this way, * * * many of the regulatory problems that have caused delay within the Commis-

sion, and imposed financial burdens upon the nation's railroads, are being eliminated.

H.R. Rep. 94-725, 94th Cong., 1st Sess. 54 (1975). See also S. Rep. 94-499, 94th Cong., 1st Sess. 3, 44 (1975); *Chicago & N.W. Transp. Co.* v. *United States*, 582 F.2d 1043, 1045-1046, 1049 (7th Cir.), cert. denied, 439 U.S. 1039 (1978). Despite the 4-R Act, however, there continued to be lengthy delays in the abandonment process.[10]

The Staggers Act responded to this problem by prescribing stricter time limits for processing abandonment applications. See 49 U.S.C. 10904(b) and (c). These provisions apply in all cases and impose "severe time constraints" (*Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 250, 253 (1981)) requiring the Commission to reach a final abandonment decision within 255 days or less.

Congress also specifically addressed the timing provisions for offers of financial assistance under Section 10905. Because an offer of purchase or subsidy postpones the Commission's issuance of a certificate of abandonment (see 49 U.S.C. 10905(d)), Section 10905 can contribute to the delays in abandonment that were of concern to Congress. Accordingly, Congress decreased the period for resolving such offers from six months under the 4-R Act (49 U.S.C. (1976 ed.) 1a(6)(a)) to 110 days (49 U.S.C. 10905(c)-(f); see pages 4-5, *supra*).[11]

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[10] See 125 Cong. Rec. 6440 (1979); 126 Cong. Rec. 7285 (1980); *Railroad Transportation Policy Act of 1979: Hearings on S. 1946 Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 46 (1979) (hereinafter cited as *Senate Hearings on S. 1946*); *Railroad Deregulation Act of 1979: Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 93, 1034 (1979) (hereinafter cited as *House Hearings*); *Railroad Deregulation Act of 1979: Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 70-71, 210, 925, 938 (1979) (hereinafter cited as *Senate Hearings on S.796*).

[11] In addition, the 4-R Act only permitted but did not require the carrier to sell a line or provide service pursuant to an offer of finan-

The legislative history of the Staggers Act makes clear that these statutory time limits were intended to eliminate delays in the abandonment process in order to reduce the burden on carriers who are required by federal law to continue operations until a certificate of abandonment is issued. Contrary to the conclusion of the court of appeals, nothing in this purpose supports the preemption of state authority to condemn once the ICC has authorized the abandonment and the carrier has been relieved of its federal obligation to furnish rail service.

In introducing the predecessor bill (S.796, 96th Cong., 1st Sess. (1979)) to the Staggers Act, Senator Cannon included in the Congressional Record a Department of Transportation analysis that explained the background of the abandonment provisions:

> The existing abandonment procedures provide no compensation to railroads for the losses incurred in operating their lines while the abandonment process is taking place. This noncompensated loss occurs even after the Commission finds that a certificate should be granted but is still awaiting subsidy from a "financially responsible person." * * *
>
> The amendment contained in this section retains the basic requirement that the Commission find that the public convenience and necessity * * * permit or require an abandonment * * *, but * * * more definite time limits are provided. A provision is also included to allow service to continue on a line if it is subsidized or purchased, but strict limits are placed on the time a railroad can be forced to continue losing operations while a subsidy or purchase agreement is being negotiated.

125 Cong. Rec. 6440-6441 (1979). Thereafter, following revision of S.796 with respect to other sections, Senator Cannon introduced a successor bill that was eventually

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cial assistance. The Staggers Act amended this statutory scheme by binding the carrier to offers that meet prescribed criteria. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 125 (1980); S. Rep. 96-470, 96th Cong., 1st Sess. 40 (1979); 125 Cong. Rec. 29967 (1979); *id.* at 6441; *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 667-668 (7th Cir. 1982).

enacted into law (S. 1946, 96th Cong., 1st Sess. (1979)), and he again included a section-by-section analysis that noted that one of the "major objectives" of the abandonment provisions is to "significantly reduc[e] the time spent processing such cases at the Commission * * *." 125 Cong. Rec. 29967 (1979).

The congressional hearings on the Act also reveal that the purpose behind the abandonment provisions was to facilitate the expeditious elimination of unneeded and unprofitable rail service by reducing delay in the issuance of ICC abandonment certificates. For example, Secretary of Transportation Goldschmidt noted that "[o]ne of the significant costs borne by the railroads is ICC-dictated continuation of service on branch lines that have little or no traffic, when normal business economics would clearly dictate abandonment of service. Present ICC procedures are designed to preserve the common carrier obligation, but they are far too slow." *Senate Hearings on S.1946*, at 91. ICC Chairman O'Neal submitted an agency analysis that stated that "[n]umerous parties have expressed concern that the Commission's abandonment procedures and standards unduly delay the ability of the railroads to withdraw from losing facilities and services." *House Hearings* 167.[12] And the Association of American Railroads, after noting the significant losses entailed by delay in abandonment proceedings (*Senate Hearings on S.796*, at 938), expressed its understanding that the abandonment provisions would

> establish definite time limits within which applications would have to be processed—approximately five to eight months depending upon whether an offer to subsidize continuation of service is made.
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> * * * * *

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[12] See also *Senate Hearings on S. 1946*, at 131 (statement of ICC Chairman O'Neal) ("[T]he bill significantly shortens the time limits within which the Commission will have to make abandonment decisions. * * * The Commission is certainly aware of the need to expedite abandonment proceedings").

> S. 796, while improving existing law by setting deadlines, would still require a railroad to litigate itself out of a line and would require the carrier to continue to bear the losses pending a final decision.
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> * * * * *
>
> The abandonment process, which can be interminable, has always placed squarely on the railroad's shoulders the losses that continue pending final disposition.

Id. at 939, 947.[13]

In sum, the abandonment provisions of the Staggers Act were designed to eliminate delay in the ICC's abandonment process so that carriers would be able promptly to cease unprofitable service. The House Report on the Act explained:

> An enormous amount of time, effort, and expense has been expended contesting abandonments. Few challenges have been successful. * * *
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> * * * * *
>
> [It is necessary to] avoid expensive protracted litigation * * * [and to] provide[] the carrier desiring to abandon a line a vehicle for prompt abandonment.

H.R. Rep. 96-1035, 96th Cong., 2d Sess. 43 (1980).

To rectify this problem, Section 402 of the Staggers Act—which contained the provisions of 49 U.S.C. 10905 as well as those of 49 U.S.C. 10903 and 10904—"expedites abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications * * * * *. The provisions in [this section] assist shippers who are sincerely inter-

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[13] The Association of American Railroads also "urge[d] that once a carrier has decided to abandon a service, but is required to continue to operate it pending public decisions as to subsidy or purchase, the public should pay all costs incurred pending its decision." *Senate Hearings on S.796*, at 946. This proposal was not considered by Congress or incorporated in the bill.

ested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 125 (1980). See also *id.* at 85 ("[n]ew time limits are established for considering abandonment applications"); S. Rep. 96-470, 96th Cong., 1st Sess. 39 (1979) ("[t]he abandonment provisions of this bill are designed to accomplish two major objectives: significantly reducing the time spent processing such cases at the Commission and improving the process by which abandoned lines can be subsidized"); *id.* at 2, 38, 40-41.

The congressional debates clearly reflect the understanding that the Act was intended to reduce the delay in issuing abandonment certificates to permit carriers to cease service. Senator Cannon noted in presenting the Conference Report that "[t]he abandonment provisions * * * should eliminate much of the cost, delay, and uncertainty involved in abandonment proceedings." 126 Cong. Rec. S14002 (daily ed. Sept. 30, 1980). In explaining the abandonment provisions in the Senate Committee's bill that ultimately were enacted into law, Senator Cannon adverted to the "more stringent deadlines for abandonments." 126 Cong. Rec. 7260 (1980). Senator Kassebaum, referring to the difficulties under existing law "of carriers [seeking] to abandon lines that are no longer contributing to the going concern of the railroad" (*id.* at 7261), stated that

> [a]mong the key measures included in this bill is [a] section * * * which streamlines the present abandonment structure. * * * It enables rail carriers to be able to cut away from their system those lines that are not contributing to the going concern value of the carrier. * * * [This section] cuts the time limit for the decision on railroad abandonment.

Id. at 7263. And in supporting the bill, Senator Glenn pointed to the provisions "that expedite the onerous, often expensive, time-consuming bureaucratic delays that have created a moribund air around rail transportation * * *

[including] the time consumed in abandonment proceedings * * *. The bill's provisions encouraging and allowing those proceedings to be expedited are excellent" (*id.* at 7293).[14]

This legislative record makes clear that the time limits in Section 10905—part of the abandonment provisions of the Staggers Act—are directed to delays that occur during the abandonment process.[15] Because a carrier must maintain service until a certificate of abandonment is issued, such delays impose a burden on the carrier to continue operations that it is seeking to terminate as unprofitable and unnecessary. Section 10905 addresses this problem by limiting the postponement of an abandonment certificate, pending an offer of financial assistance, to a maximum of 110 days.

State condemnation of already abandoned rail lines does not conflict with this congressional purpose. Once the process under Section 10905 has been completed with-

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[14] In addition, Senator Cochran proposed an amendment to the bill to eliminate the stringent time limits in the abandonment provisions. Senator Cochran explained that the bill "would significantly shorten the process under which abandonment proceedings are now carried out * * * [and would] set a much more compressed time frame under which abandonment applications will be considered by the Interstate Commerce Commission." 126 Cong. Rec. 7282 (1980). Senator Cannon opposed the amendment because of the need to "reduc[e] the time spent processing such cases at the Commission * * *. The Cochran amendment would eliminate these procedural reforms and abandonment cases would continue to be as long and expensive as they now are" (*id.* at 7285). Senator Kassebaum also opposed the Cochran amendment on the ground that it would have "[s]tretch[ed] out the time to make a case against an abandonment * * *" (*ibid.*). As Senator Kassebaum emphasized:

> [M]aking a railroad line operate that desires to abandon * * * is going to * * * add a financial drain to the railroad * * *.
>
> * * * * *
>
> Maintaining the status quo of stretching abandonment proceedings before the ICC * * * must not be perpetuated.

Ibid. Following this debate, the Cochran amendment was defeated (*id.* at 7286).

[15] See also J.S. App. A33 (comments of the Association of American Railroads).

out a purchase or subsidy, the carrier is granted a certificate of abandonment and is free to cease rail service. State condemnation of a rail line that has been abandoned cannot, by definition, delay the issuance of the abandonment certificate that relieves the carrier of its obligation under federal law to continue rail operations.

b. *Valuation Procedures.* The court of appeals was also incorrect in concluding (J.S. App. A8) that state condemnation of the Hayfield segment "would circumvent the Commission's determination of value" or deviate from the "expedited method by which [the] sale price may be determined" under Section 10905.[16] No issue exists here of "circumvention" or the disregard of a statutorily prescribed procedure for valuation. Again, the fundamental point is that the ICC's valuation process is designed to deal solely with pre-abandonment acquisitions. There is certainly nothing in the language or structure of the statute that suggests that the pre-abandonment valuation process was intended to constitute the definitive determination of value for all time and for all purposes and thus that it should, by implication, preclude conventional post-abandonment transactions such as eminent domain.

In fact, Section 10905(f)(1)(A) allows the ICC only 60 days to determine the value of a line, and such a brief period requires the Commission to utilize "summary procedures" (*Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 671 (7th Cir. 1982)).[17] This "expedited

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[16] The court of appeals (J.S. App. A8) did not principally rely upon the fact that a subsidy offer under Section 10905 had actually been made in this case; rather, it found preemption based on the existence of Section 10905 and presumably would apply its holding where the statutory procedure in fact had not been invoked. Nor did the court of appeals distinguish between cases involving a *subsidy* offer and those in which a *purchase* offer is made.

[17] Contrary to appellee's suggestion (Response to Brief for the United States as Amicus Curiae 6 n.6), this discussion does not in any way cast doubt on the constitutional adequacy of the Commission's valuation procedures under Section 10905. See *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d at 671.

method" (J.S. App. A8) is necessary in order to prevent delay and to facilitate continued and uninterrupted service on a line that would otherwise be abandoned. Nothing in Section 10905 suggests, however, that the ICC's abbreviated valuation procedures should be taken to establish the value of a line in all contexts or to preclude a state court from setting a different value based on record evidence at the time of condemnation.[18] And there is certainly no warrant for reading into the provision authorizing the ICC to make summary pre-abandonment valuations a broad implied substantive command to displace normal state power to condemn railroad properties after the federal regulatory scheme has fully run its course and the properties have been duly abandoned.

C. The Interstate Commerce Commission Has Concluded That Its Abandonment Authority Does Not Extend Past The Point Of Abandonment And Therefore Has Recognized That Section 10905 Does Not Preempt A State's Post-Abandonment Authority To Condemn A Rail Line

In matters of statutory construction, "[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute by the agency charged with the enforcement of that statute." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). The courts are "to be guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.'" *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). And "[p]articularly is this respect due when"—as in this case concerning statutory provisions only recently enacted—"the administrative practice at stake 'involves a contemporaneous construction of a

[18] It is unnecessary to consider in this case whether a state condemnation court would apply the same valuation principles as the ICC (cf. *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d at 668) or what weight if any would be given to the ICC's determination of value.

statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'" *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted). These principles of statutory interpretation are fully applicable to the Interstate Commerce Commission. See, *e.g.*, *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 648 n.26 (1978).

Here, the Commission has recognized that its abandonment authority under the Act does not extend beyond the point at which the certificate of abandonment becomes effective. Because it does not have the power to regulate the transfer of a rail line after an abandonment certificate has taken effect, the Commission has concluded that a state's post-abandonment authority to condemn is not preempted.[19]

In *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981), the Commission observed that "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within the State's reserved jurisdiction. Questions of title to, and disposition of, the property are matters subject to State law." See also *Common Carrier Status of States*, 363 I.C.C. 132, 135 (1980), aff'd *sub nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982) ("when a rail line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction"); *Modern Handcraft, Inc.—Abandonment in Jackson County, Mo.*, 363 I.C.C. 969, 972 (1981).[20]

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[19] In addition, one court has assumed that states may condemn abandoned railroad lines. See *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 669 (7th Cir. 1982).

[20] The Association of American Railroads also has recognized that a state may exercise its post-abandonment condemnation power notwithstanding the existence and invocation of the procedure under Section 10905. See 365 I.C.C. at 260; J.S. App. A38. In addition, AAR has pointed out at least one instance in which a state withdrew its offer of financial assistance under the 4-R Act and subsequently condemned the abandoned line pursuant to state law (*ibid.*).

The Commission has adhered to this position after the decision of the court of appeals in this case. See *Chicago & N.W. Transp. Co.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc.*, ICC Docket No. AB-1 (Sub-No. 144) (May 5, 1983) ("after all conditions to an abandonment have been complied with and the certificate is effective, federal interest and Commission jurisdiction end") (emphasis omitted);[21] see also *Atchison, T. & S. F. Ry.—Abandonment—in Los Angeles County, Cal.*, ICC Docket No. AB-52 (Sub-No. 18) (Feb. 25, 1983) at 6, aff'd (Apr. 1, 1983), appeal pending *sub nom. City of Hermosa Beach* v. *ICC*, No. 83-7420 (9th Cir. filed June 10, 1983) (subsequent to the certificate of abandonment, the carrier is "fully subject to State and local laws and regulations * * * to the same extent as any other property owner").[22] Indeed, in deciding not to participate in the present case in the lower courts, the ICC concluded that "once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation" (J.S. App. A45; footnote omitted).

The Commission's views fortify the conclusion suggested by the language, structure, and history of the Act and by the policies that animate it: once a proper certificate of abandonment has been issued, federal regulatory authority has run its course and the former rail line reverts to its status as ordinary private property fully subject to the power of the state. Federal regula-

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[21] This decision is reprinted in the appendix to appellants' joint supplemental memorandum (A5).

[22] While appearing to recognize that deference is due the interpretation of the Commission, the court of appeals sought (J.S. App. A8-A11) to distinguish this line of authorities. Although the court of appeals was surely correct that none of these statements is four-square with the precise issue presented here, we believe that it took too narrow a view of the position and analysis expressed by the Commission. For this reason, the court of appeals' attempted distinction of these Commission pronouncements is unpersuasive and does not rebut the Commission's determination that it lacks authority—let alone exclusive and preemptive authority—over post-abandonment acquisitions of rail lines.

tion will again come into play only when, after condemnation, a certificate of convenience and necessity for new rail service is sought from the ICC.[23]

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[23] Of course state law would be preempted to the extent that it actually interfered with a certificate of abandonment issued by the Commission. For example, if the ICC authorized a valid abandonment on the ground that relocation of the track was essential to enable the carrier to provide adequate interstate service elsewhere, an order by a state court (or, for that matter, a federal court) barring such transfer would be improper. Cf. *In re Boston & Maine Corp.*, 596 F.2d 2, 5-7 (1st Cir. 1979); *In re Penn Central Transp. Co.*, 366 F. Supp. 62, 63 (E.D. Pa. 1973); *Texas & Pac. Ry. Abandonment*, 363 I.C.C. 666, 678-679 (1980). In general, however, neither a state's post-abandonment condemnation action, nor preliminary relief incidental to that action, would conflict with an authorized abandonment. See J.S. App. A47; see also *id.* at A55, A60.

Appellee contends (Response to Brief for the United States as Amicus Curiae 3-5 & n.4, 7 n.7) that the Commission's abandonment certificate in this case precluded the temporary restraining order entered by the state court to enjoin appellee's removal of track. We disagree. Initially, it should be noted that the court of appeals' preemption holding did not rest on the entry of the restraining order. Beyond that, there is no inconsistency between the TRO and the abandonment certificate. Appellee relies (*id.* at 4 n.4) on the finding by the Administrative Law Judge that appellee "has shown * * * that there is need elsewhere in its system for reusable track and other materials in the Line or that these assets may be liquidated to provide needed cash" (decision of July 10, 1981, at 21). Read in context, however, this finding simply reflects the so-called "opportunity cost" that continued service would impose. See *Abandonment of Railroad Lines—Use of Opportunity Costs*, 360 I.C.C. 571, 571 (1979), aff'd *sub nom. Farmland Industries, Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981). Balancing "[t]his burden" against the competing considerations weighing in favor of continued service (decision of July 10, 1981, at 21), the ALJ concluded, and the Commission affirmed, that the obligations of federal law did not require the carrier to continue to commit its resources to providing service on the line. Nothing in this determination indicates, however, that appellee's post-abandonment removal of track could not be enjoined for independent reasons resting on state law. A state may have a number of grounds—such as tax liens or environmental restrictions—for seeking to block the removal of track. Cf. *City of Alexandria* v. *Chicago, R. I. & Pac. R.R.*, 311 F.2d 7 (5th Cir. 1962), rehearing denied, 321 F.2d 822 (5th Cir.), cert. denied, 375 U.S. 922 (1963). Finally, we note that appellee may

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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have an action for consequential damages under Minnesota law (see J.S. App. A7) or be entitled on remand to recover against the appeal bond for "damages * * * on account of delay" (*id.* at A11); the United States takes no position on those issues.

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